

EXHIBIT A

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TO UNSEALING ORDER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

(PROCEEDING UNDER SEAL)

Gardner Denver, Inc.,	.	Docket #CV-16-159 (JHS)
	.	
Plaintiff,	.	
	.	United States Courthouse
vs.	.	Philadelphia, PA
	.	September 15, 2017
Arch Insurance Company,	.	2:05 p.m.
et al.,	.	
	.	
Defendants.	.	

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TRANSCRIPT OF MOTION TO COMPEL
BEFORE THE HONORABLE JOEL H. SLOMSKY
UNITED STATES DISTRICT COURT JUDGE

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1 THE CLERK: All rise please. Court is now in
2 session, the Honorable Joel H. Slomsky presiding.

3 THE COURT: Please be seated. This is the case of
4 Denver, Inc. v. Arch Insurance Company, et al., Civil Action
5 #16-159. And as counsel for the Plaintiffs, we have Barry
6 Buchman, Esquire.

7 MR. BUCHMAN: Good afternoon, Your Honor.

8 THE COURT: Good afternoon. And seated with you at
9 counsel table is Richard Placey, Esquire.

10 MR. PLACEY: Good afternoon, Your Honor.

11 THE COURT: Good afternoon. And Kyle Poelker,
12 Esquire.

13 MR. POELKER: Good afternoon, Your Honor.

14 THE COURT: Welcome. And on behalf of the
15 Defendants -- let's see, I have to look at the docket to see
16 who represents which Defendant. On behalf of Arch we have
17 David Creagan, Esquire.

18 MR. CREAGAN: Good afternoon, Your Honor.

19 THE COURT: Good afternoon. And Justin Fortescue,
20 Esquire.

21 MR. FORTESCUE: That's right, good afternoon, Your
22 Honor.

23 THE COURT: Okay, welcome. And on behalf of Federal
24 we have Janet Davis, Esquire.

25 MS. DAVIS: Good afternoon, Your Honor.

1 THE COURT: Good afternoon. And Kristin Abel,
2 Esquire.

3 MS. ABEL: Good afternoon, Your Honor.

4 THE COURT: Good afternoon, welcome. And on behalf
5 of Continental Casualty Company, we have Matthew Olesh,
6 Esquire -- no, I'm sorry, Michael Goodstein, Esquire.

7 MR. GOODSTEIN: Good afternoon, Your Honor. I'm
8 pretty sure Mr. Olesh filed a withdrawal a while ago, but I
9 could be wrong.

10 THE COURT: Okay. He was terminated from the
11 docket.

12 (Laughter)

13 MR. GOODSTEIN: I'll let him know.

14 THE COURT: 12/21/16. I don't like the word
15 terminated. In any event, also with you is Beth Weisser,
16 Esquire.

17 MS. WEISSER: Good afternoon, Your Honor.

18 THE COURT: Good afternoon. We meet again. The
19 Plaintiffs have filed a Motion to Compel Discovery. And can -
20 - Mr. Buchman, tell me what's the status of it?

21 MR. BUCHMAN: Yes, Your Honor, good morning -- good
22 afternoon, I should say.

23 MR. CREAGAN: Your Honor, may I say something?

24 THE COURT: Yes.

25 MR. CREAGAN: Before these proceedings --

1 THE COURT: You can be seated. Everybody --

2 MR. CREAGAN: Before these proceedings get
3 started --

4 THE COURT: -- has to speak into the microphone.

5 MR. CREAGAN: -- Defendants request that the
6 transcript of this discovery hearing be under seal.

7 MR. BUCHMAN: And we consented to that, Your Honor.

8 THE COURT: All right, I'll so order that it be
9 placed under seal and not be made available publicly.

10 MR. CREAGAN: Thank you, Your Honor.

11 THE COURT: Okay.

12 MR. BUCHMAN: May I approach the podium?

13 THE COURT: Yes.

14 MR. BUCHMAN: Yes, so Your Honor, let me start with
15 the status. As we previewed to Chambers in phone call to your
16 Chambers yesterday afternoon, we do have the --

17 THE COURT: Could you pull up the mic closer to you?

18 MR. BUCHMAN: Sorry. We have made some progress,
19 even since the filing of the briefs a couple of weeks ago, and
20 we've been able to -- of the four categories that were briefed
21 in the pleadings, our motion and their oppositions, we've been
22 able to remove from the agenda, if you will, the issue of
23 other insured discovery and the issue of claims manual
24 discovery. So the only issues, and they're different as to
25 each carrier, it's not that all three carriers have both

1 issues, but the only issues still in play writ large are
2 reinsurance discovery and drafting history and --

3 THE COURT: What?

4 MR. BUCHMAN: Drafting history of the bump-up
5 exclusion and related documents regarding industry
6 understanding and usage of that -- of the bump-up exclusion.

7 And so we have made some progress. One of the things I'll
8 be asking for at the end actually is some, as a sort of
9 cleanup housekeeping issue, is maybe putting some hard
10 deadlines on things that have agreed to be produced. We've
11 already had to ask you for one extension of the original Case
12 Management Order, we'd like to avoid having to come back for
13 more time.

14 THE COURT: Okay.

15 MR. BUCHMAN: And so --

16 THE COURT: Now, I've read the motion and
17 memorandum, Document 56, which is Plaintiff's. I have not
18 read every exhibit attached, but I looked at them. There is a
19 -- Document 57 is Arch's opposition and Document 60 is
20 Continental Casualty's response. And I take it from Documents
21 60 and 59, which is Federal Insurance's response, that with
22 respect to the reinsurance issue, they may not have any
23 documents.

24 MR. BUCHMAN: That's correct.

25 THE COURT: All right.

1 MR. BUCHMAN: And so if I may, I'll actually tell --
2 walk through what the different issues, remaining issues, are
3 as to each carrier, sort of a preview. And then, well, we've
4 actually, amongst ourselves -- subject to Your Honor's
5 approval, obviously we'll do it however you want, but we
6 thought rather than me arguing all three points, the one as to
7 Arch, the one as to Federal, and actually, we may have just
8 had some late-breaking news in the hallway, and at least on a
9 non-prejudiced basis, may be able to hold the issues in CNA in
10 abeyance. Rather than arguing -- discussing all three points
11 at once, we thought we'd go issue by issue. I would argue,
12 you know, they would respond, come back on the second issue,
13 if that works for Your Honor.

14 THE COURT: That's fine.

15 MR. BUCHMAN: Okay, thank you. So the remaining
16 issue with Arch, Your Honor, is the discoverability in our
17 view, in Arch's view non-discoverability, of three claims
18 status reports that Arch provided to its reinsurers after the
19 underlying litigation arose and after we tendered our claim
20 for coverage for that underlying litigation. These are --

21 THE COURT: When you say Arch provided to the three
22 insurers, Arch is one insurer and who are the others?

23 MR. BUCHMAN: No, so as Your Honor may recall from
24 the brief, one of the disputed categories is the
25 discoverability of these three Defendants' communications with

1 their reinsurers, that is the insurance companies --

2 THE COURT: Oh, oh, the reinsurer, you're --

3 MR. BUCHMAN: Yeah --

4 THE COURT: -- doing the reinsurance first.

5 MR. BUCHMAN: Right.

6 THE COURT: Okay.

7 MR. BUCHMAN: Right. So we have a legal dispute
8 with Arch still. It's been narrowed, but there is still a
9 legal dispute over the discoverability of three claims reports
10 that they provided to their reinsurers, Arch's reinsurers.

11 THE COURT: And you know these exist as a fact?

12 MR. BUCHMAN: Yes, and I'll explain how I know that,
13 which is that part of what's been going on since the end of
14 August is pre-production review of certain documents so we
15 could either agree or not as to their relevance. And so I'll
16 come back that in a minute, I just want to give you the
17 roadmap on the other two, if that's okay. So that's the issue
18 as to Arch.

19 The issue as to Federal pertains to drafting history,
20 documents regarding drafting history or generalized industry
21 understanding of the bump-up exclusion writ large, or bump-up
22 exclusions writ large. Now, important to make a procedural
23 point here, and Ms. Davis and I have talked about this at
24 length, the two buckets of documents we're going to be talking
25 about in that regard with respect to Federal were part of our

1 original requests, were encompassed within our original
2 requests, which were much broader than these two buckets. We
3 then proposed to narrow those, and we only moved on the
4 proposed narrowed requests.

5 Rather than -- but since we did that, we found out about
6 these other two buckets of documents related to the, you know,
7 drafting history and usage of the bump-up exclusion, one of
8 which, just by way of example, Judge, is the individual files
9 of Anthony Galban. If you don't remember, Your Honor, Anthony
10 Galban is the Federal Executive, specifically the Vice
11 President of D&O Underwriting, whose statement regarding the
12 industry understanding of the bump-up exclusion we quoted
13 verbatim in our complaint. And of course, the complaint is a
14 starting point for what the claims and defenses are in the
15 case and thus, you know, what's relevant.

16 So the two buckets are his files, whether or not they
17 relate to the five GDI bump-up exclusions that we discussed in
18 the motion, that is the five bump-up exclusions that GDI had
19 in the 10 year period we've talked about before. And then the
20 other bucket of Federal documents is they have two -- you
21 know, one of Federal's points has been, look, we're only
22 excess to these five GDI bump-up exclusions. We since have
23 learned that Federal, who is a prolific player in the D&O
24 marketplace, even more so than Arch and CNA, has two primary
25 D&O policy forms, specimen forms, with their own bump-up

1 exclusions that are similar to, though not identical to, the
2 five so-called GDI BUEs. And so we've asked for those
3 documents as well.

4 And so what we've done, Judge, is rather than just revert
5 back to our original requests, which encompassed that, but a
6 whole lot more, which was the starting point for the problem,
7 we've just in the last couple of days served supplemental
8 requests targeted discretely and surgically at just those two
9 buckets to show that we're trying to be reasonable and not
10 pose an undue burden. And the reason why we're raising it
11 today, and we're doing this by agreement with Ms. Davis, is in
12 the interest of judicial economy. Rather than waiting for her
13 to file her formal 30-day response, we've already been meeting
14 and conferring about these two buckets. We thought what we
15 might do is akin to what we did on July 5th when, although we
16 were only formally before you on the category 1 discovery
17 dispute, you gave us some advance guidance on the category 2
18 disputes that we're now here on today. We thought that a kind
19 of advance guidance again on these two buckets and our
20 supplemental requests, which I have a copy of if Your Honor
21 wants, and there's only six of them, would be useful in our
22 ongoing discussions. So that's Federal.

23 And then lastly, with CNA, we have a process issue,
24 although again, I think we may have just made some progress
25 out in the hallway, with respect to what they did to search

1 for drafting history, and in particular, the drafting history
2 of their prior side a only policy sold to GDI, which Your
3 Honor may recall from prior proceedings, which they argued to
4 you in category 1 was based on their own form that they
5 crafted and therefore it's their, you know, bump-up exclusion.
6 We have -- Mr. Goodstein and I have talked about a possible
7 certification or talked about a certification regarding their
8 search efforts. Obviously I would want time to review that in
9 detail with my client and co-counsel, and it may resolve the
10 issue.

11 So let me start, if I may, with the substance of the
12 legal dispute on these three reinsurance documents with Arch,
13 and then Mr. Creagan can respond. As I said, they are three
14 claim status reports that Arch provided to its reinsurers
15 about the underlying shareholder litigation that gives rise to
16 this coverage case and about Gardner Denver's corresponding
17 coverage claim. We've already -- Mr. Creagan and I have
18 already discussed, and he has confirmed, that there are no
19 communications with their reinsurers from before our claim
20 arises about GDI or anything about this case; that was one of
21 the points Mr. Creagan made in Arch's brief is that this is
22 treaty reinsurance not facultative reinsurance, it's not
23 reinsurance specific to GDI's policy. Those -- that issue is
24 off the table. These three documents are specifically about
25 the underlying litigation at issue, the underlying settlement

1 at issue and our coverage claim at issue.

2 Now, how do I know that, to Your Honor's question.

3 Shortly after we filed the Motion to Compel, Mr. Creagan
4 approached me about coming up to review on a pre-production
5 basis, obviously therefore the fact that it was non-
6 prejudiced, meaning that the fact that he was showing them to
7 me did not waive his right to contest their discoverability,
8 to see if maybe we would agree that they were not
9 discoverable. And there were actually two categories we did
10 that on, reinsurance and claims manuals. He didn't have other
11 insured and Arch has agreed to produce the drafting history of
12 the only one of the five GDI BUEs that they have drafting
13 history on, which is the one in the Arch enhancement
14 endorsement.

15 I was a little bit apprehensive, as I told Mr. Creagan at
16 the time, if only because the whole point of discovery being
17 broader than admissibility is that you don't have to determine
18 in a vacuum at the outset, before you've seen any documents
19 from the insurers, much less any deposition -- and I should
20 note in that regard, at the time we did this review, which was
21 this past Monday, we had not seen a single document from any
22 of the insurers. As of two weeks ago, GDI has produced 25 --
23 approximately 25,000 pages of documents --

24 THE COURT: Is that all?

25 MR. BUCHMAN: What's that?

1 THE COURT: Is that all?

2 MR. BUCHMAN: That's it, Judge. I know there are
3 cases with more.

4 THE COURT: Is the claim that these status reports
5 may contain language to the effect of our saying to the
6 reinsurer, hey, we could be on the line here based upon an
7 ambiguity in the policy and the language and the
8 interpretation and et cetera?

9 MR. BUCHMAN: Right. [REDACTED]

[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED] And so what they do is show what they raised,
17 when they raised it, and of particular significance, they
18 discuss these -- what we describe in our brief as the
19 allocation issue, which is a separate coverage issue in this
20 case, after the bump-up exclusion issue, which is even if this
21 claim is otherwise covered, say the insurers, a significant
22 portion of the underlying \$30 million settlement is
23 attributable to KKR, who's not our insured, rather than GDI,
24 who is insured by us, right. And so they discuss that issue,
25 they discuss the relative risks and issues in the underlying

1 litigation --

2 THE COURT: How do you know this? Have you seen the
3 documents?

4 MR. BUCHMAN: Yes. I'm sorry, Judge, so I didn't
5 finish the process point. So -- I apologize, I got diverted.
6 So the problem I had conceptually was it put me in that
7 position of having to decide ultimate relevance before I'd
8 seen a single document from the insurers. And I nonetheless
9 agreed to do it. We sent two people up there, including my
10 colleague, Mr. Poelker and Mr. Rubinstein who was here for the
11 Motion to Dismiss hearing last year. And we went up there to
12 look at it. And we looked at both these three reinsurance
13 reports and the claims manuals.

14 And this process has already benefitted Arch because
15 based on that review and notwithstanding the reservations that
16 I just mentioned, we agreed to forego the claims manuals. So
17 that's now off the table. The only thing we asked for was
18 these three reinsurance claim status reports [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

22 THE COURT: Let me see if I understand this. At the
23 invitation of Arch, your representative read these documents,
24 but then Arch is not willing to give you a copy of it?

25 MR. BUCHMAN: That's correct.

1 a jury is going to decide it's entitled to. It's a document
2 that's not privileged, it's a claim status report, okay, from
3 the Director of cedent claims or reinsurance claims at Arch
4 to the reinsurer about our claim and about our underlying
5 litigation, discussing one of the very issues, allocation,
6 that you've raised in this case.

7 And Arch's response was but it doesn't contain a
8 statement against interest, an admission that the bump-up
9 exclusion doesn't apply here. It doesn't contain a statement
10 as explicit as Mr. Galban's statement that Your Honor quoted
11 in your Motion to Dismiss opinion. And I said that's not the
12 standard on discovery. And with the Court's indulgence,
13 there's a case that we cited specifically on reinsurance from
14 this Court, the Saldey (ph.) v. Paul Revere case, 224 F.R.D.
15 1691, that order discovery of a variety of things, including
16 reinsurance. And the Court said, in response to a similar
17 argument by the insurer there, the following, {quote} "While
18 it is true that the depositions to date of those employees
19 who handled Plaintiff's claim have not produced statements by
20 those employees that they were implementing the insurance
21 company's bad faith policy to deny valid claims, we agree
22 with Plaintiff, that is, the policy holder, that blatant
23 admissions of wrongdoing are not required in order to
24 establish a nexus for discovery." And the Court went on to
25 say that reinsurance communications were discoverable later

1 in the opinion.

2 That is similar to the Baxter case that we cited on
3 reinsurance, a post-December 15 proportionality amendment
4 case decided just earlier this year, where the Court said,
5 look, it's clear to me from the documents I've already seen
6 on reinsurance that they address, at least to some extent,
7 {quote, unquote} "the scope of coverage." There doesn't have
8 to be a smoking gun statement against interest or an explicit
9 statement that this is industry custom and practice on the
10 bump-up exclusion. That is not the standard at this stage.

11 THE COURT: The bottom line is this, Rule 26(b)(1)
12 in terms of scope says parties may obtain discovery regarding
13 any non-privileged matter that is relevant to any party's
14 claim or defense. And then it goes on to talk about
15 proportionality.

16 MR. BUCHMAN: That's right. And we're talking about
17 30 pages of documents at most --

18 THE COURT: And tell me how is it relevant to a
19 claim or defense?

20 MR. BUCHMAN: Well, let's take the easiest --

21 THE COURT: You've read them now, what's in them?

22 MR. BUCHMAN: What's that?

23 THE COURT: You've read them now, what's in there
24 that's relevant to a claim or defense?

25 MR. BUCHMAN: [REDACTED]

1 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

5 THE COURT: [REDACTED]

6 MR. BUCHMAN: I'm sorry?

7 THE COURT: [REDACTED]

[REDACTED]

9 MR. BUCHMAN: [REDACTED]

[REDACTED]

[REDACTED]

12 THE COURT: Oh, okay.

13 MR. BUCHMAN: [REDACTED]

[REDACTED]

15 THE COURT: Why is that statement relevant?

16 MR. BUCHMAN: Judge, how they raise the defense,
17 what order is it -- if it was just a throw-in, you know, it
18 was discussed among a bunch of other issues, a bunch of other
19 coverage defenses that they raised, I think that goes to the
20 issue of how clear and unambiguous they thought the issue was
21 at the time.

22 But let me make it easier. Let's talk about allocation
23 because we can debate -- excuse me -- pure policy
24 interpretation. We cited a case to this Court in our motion
25 at pages 16 and 17 of our brief, the name of the case is

1 National Union v. Continental, out of the Northern District
2 of Illinois, the same case that decided the Baxter case just
3 a few months ago on reinsurance. The cite for National Union
4 is 116 F.R.D. 78, okay. And that was a case -- that is a
5 case that is virtually on all fours to what we're dealing
6 here with allocation. It is a case that involved underlying
7 securities litigation and thus was a case about coverage
8 under a D&O policy. And among other defenses that the
9 insurer raised was a defense that was intertwined with the
10 nature of the underlying litigation. They disputed how the
11 policyholder settled the case; they said it was a violation
12 of the cooperation clause, how they settled the case. And
13 what the Court said, and we quoted it on page 16 and 17 of
14 our brief, what the Court said is that these insurers and
15 these reinsurance communications {quote} "may well have
16 discussed their positions on the proposed underlying
17 securities settlements or their positions in general in the
18 underlying securities litigation with some or all of their
19 reinsurers. Any such discussions would obviously be
20 relevant."

21 As I said, the allocation defense is intertwined with
22 the underlying litigation because it's a defense that says
23 GDI, you paid too much, KKR didn't pay enough. Okay. [REDACTED]

[REDACTED]

[REDACTED]

1

2

3 And so -- and this relevancy point on allocation is
4 buttressed by the fact, Judge, we mentioned this in our brief
5 as well, that we offered -- because I said to the insurers
6 during the meet and confer, look, we can debate the discovery
7 of reinsurance communications on policy interpretation. We
8 think the weight of authority goes our way, but obviously
9 they have a couple of cases going the other way. There's no
10 anti-National Union case that says even if it's a collateral
11 issue related to the underlying litigation, like notice in
12 Rhone-Poulenc III, as we labeled it, like allocation,
13 National Union says that's clearly relevant. So I said,
14 look, if you guys drop the allocation defense, right, which
15 is a throw-in, back-up, fall-back defense anyway, you know,
16 if the bump-up exclusion defense fails, we will withdraw our
17 reinsurance discovery, our request for reinsurance discovery.
18 That offer was turned down.

19 The insurers and Arch, particularly in this instance
20 relevant here, decided that it wants to continue pressing the
21 allocation defense, and now it is refusing --

22 THE COURT: Let me make sure I understand this.

23 MR. BUCHMAN: Yes.

24 THE COURT: Arch is contending that when GDI settled
25 the claim in those underlying lawsuits that they paid too

1 much, and therefore -- is that what --

2 MR. BUCHMAN: They're not claiming that the \$3
3 million overall was too much vis-a-vis the Plaintiff --

4 THE COURT: Explain to me the allocation then. I
5 didn't get a clear understanding of it from the --

6 MR. BUCHMAN: Sure.

7 THE COURT: -- from the brief. Go ahead, say it.
8 Explain it to me.

9 MR. BUCHMAN: So the allocation issue is not one
10 that says \$30 million was too much for the Defendants
11 collectively to the pay to the Plaintiffs. Allocation says
12 within that \$30 million, you, GDI, as one Defendant, should
13 not have paid the \$30 million in full. KKR, who was a co-
14 Defendant but against whom the claims were entirely
15 derivative --

16 THE COURT: Oh, I see.

17 MR. BUCHMAN: -- of the claims against you should
18 have kicked in a significant share, thereby reducing our
19 obligation to you because we only insure you, not KKR. So
20 even though it is not an issue that challenges the
21 reasonableness of the underlying settlement writ large, it is
22 a defense that challenges the reasonableness of GDI's
23 contribution to that settlement.

24 THE COURT: All right. Now given that, how does
25 reinsurance come into play?

1 MR. BUCHMAN: It comes into the play the same way
2 the National Union Court said it comes into play, which is by
3 definition, that defense looks to what were the relative
4 risks of GDI versus KKR in the underlying litigation.

5 THE COURT: All right, now, my understanding is that
6 each insurer in following form had \$10 million worth of
7 insurance. Why are reinsurers being put on notice?

8 MR. BUCHMAN: I think the reinsurance policies that
9 these -- well, CNA has learned that it doesn't have any
10 reinsurance at all, but -- for these GDI policies, but the
11 idea is that reinsurance is basically an insurance policy on
12 the insurance policy, right? So what Arch is saying is look,
13 if we have to pay these guys we're going to -- to GDI that
14 is, if we have to pay GDI on their coverage case, we're going
15 to be looking at you to reimburse us.

16 THE COURT: All right, so in other words, the
17 reinsurance may have some, for lack of a better word,
18 deductible. And above that, it could be a million, 2
19 million, 3 million above that, they would have to pay the
20 claims of Arch, et cetera, whoever has the reinsurance. But
21 so that what you're saying is that these three reports would
22 discuss the approach of Arch to do what? To do what?

23 MR. BUCHMAN: [REDACTED]
[REDACTED]
[REDACTED]

1 [REDACTED] [REDACTED]

2 [REDACTED]

3 THE COURT: So they're relevant to the issue of
4 allocation.

5 MR. BUCHMAN: At a minimum. At a minimum. And
6 that's exactly what National Union says.

7 THE COURT: We're not saying they're relevant to the
8 issue of the interpretation of the loss clause in the
9 policies?

10 MR. BUCHMAN: I believe that they are because I
11 believe even merely how you describe your -- to your
12 reinsurer the coverage defenses you've raised vis-a-vis your
13 policyholder is potentially relevant. I think that's an
14 admissibility and weight issue and not a discoverability
15 issue, even if it's not a smoking gun admission, you know, as
16 I was saying earlier. But my point in focusing on allocation
17 is that even if one were to disagree with that, given the
18 National Union case, it's hard to see how it wouldn't be
19 relevant, at least to the allocation issue --

20 THE COURT: Okay.

21 MR. BUCHMAN: -- and I would like -- you know, the
22 National Union said something very -- in terms of my offer to
23 withdraw reinsurance and how you can't press a reinsurance --
24 a defense like that and then block reinsurance discovery on
25 it, the National Union Court said, in talking about a

1 separate issue on which reinsurance was discoverable, which
2 was the insurers argument that the policyholder had made
3 misrepresentations during the underwriting process, the
4 National Union Court said, and I quote, "Insurers
5 conveniently ignore the inconsistency between, one, their own
6 insistence that discovery is impermissible when it may lead
7 to information as to matters on which they relied, and two,
8 their own persistent efforts to keep their reliance a live
9 issue in these lawsuits." I skipped a few words, they'll put
10 brackets in there. But the point is, and this Court said the
11 same thing in Rhone Poulenc III, in November of 1991 when it
12 said, "By raising a defense" -- in that case notice, in this
13 case allocation -- "a party opens the door to discovery
14 concerning that defense."

15 THE COURT: Okay.

16 MR. BUCHMAN: And so when you consider that
17 relevance point and then you consider the fact that we're
18 talking about 30 pages --

19 THE COURT: Okay.

20 MR. BUCHMAN: -- I think the balance is clear.

21 THE COURT: Now let me, let's go on -- let's go on
22 to Federal's drafting history, the file of Anthony -- how do
23 you --

24 MR. BUCHMAN: Did you want me to do that now or did
25 you want Mr. Creagan to respond on the issues?

1 THE COURT: Oh, you want to respond to it?

2 MR. CREAGAN: I'd like to respond, Your Honor, if I
3 may.

4 THE COURT: Okay. Okay.

5 MR. BUCHMAN: Thank you, Your Honor.

6 (Pause in proceedings)

7 MR. CREAGAN: First of all, let me say I am
8 gratified that we were able to work out three of the four
9 issues that separated us. Three out of four, that's not bad.
10 We're left with reinsurance. I'll be brief and I'll limit
11 myself to a few points. The first point, in GDI's motion to
12 compel discovery of these reinsurance communications, they
13 state, "the requested communications may show the defendants
14 have taken inconsistent positions on that issue, i.e., the
15 issue of what does this bump-up exclusion mean?" It's the
16 contract interpretation issue. The communications also will
17 shed light on insurance industry custom and practice, in
18 other words because Arch is in insurance company and it's
19 reinsurers are -- reinsurance companies, they're all in the
20 business, they're all in the industry. There could be a
21 discussion of the issue in this case, and perhaps that
22 discussion would shed some light on what the insurance
23 industry in general thinks about bump-up exclusions in
24 general, to the extent that's even -- even matters in this
25 case.

1 THE COURT: Put those aside.

2 MR. CREAGAN: No, those are the points that they
3 made.

4 THE COURT: Well, Mr. Buchman did not argue those
5 points.

6 MR. CREAGAN: Well, so now he's arguing the
7 allocation --

8 THE COURT: So, he's strictly --

9 MR. CREAGAN: -- and let me get to that --

10 THE COURT: -- mainly the allocation.

11 MR. CREAGAN: The cases he cites, for example, are
12 all instances where the plaintiff, it's usually the plaintiff
13 who's requesting these communications has not actually seen
14 them. So the words of the court in the Saldi v. Paul Revere
15 case for example, are -- which permitted discovery of
16 reinsurance communications because they -- they may
17 contained admissions, or otherwise show the insurer's state
18 of mind concerning plaintiff's insurance claim. The Baxter
19 case may contain relevant information. The other case that
20 is cited, the National Union case, "insurers may well have
21 discussed their positions on the proposed settlements."
22 Well, we're no longer in the realm of "may well have, might,
23 could be." We've got the documents. GDI's lawyers have the
24 opportunity to review them, and as we told them when we
25 extended the invitation to come up to Philadelphia and take a

1 look at White and Williams, we said, "You know, we don't
2 think there's anything in there. We don't think there are
3 any inconsistent positions, statements, industry custom and
4 practice, et cetera, but you don't have to take our word for
5 it, come up and take a look and you'll see that none of that
6 is there," which they did. Now, since then he's gone onto
7 the allocation argument which is something that we hadn't
8 heard before. I've got copies of the three reports; this
9 hearing is sealed. I've got copies of the three reports here
10 with me and I can say that [REDACTED]

13 [REDACTED] and no different from what GDI has been told multiple
14 times by Arch in much more detailed reservations of rights
15 letters. [REDACTED]

■ [REDACTED]
■ [REDACTED]
■ [REDACTED] [REDACTED]

4 THE COURT: If it's so de minimis why are you
5 fighting -- giving it to him?

6 MR. CREAGAN: Because that's a very good question, I
7 knew you were going to ask it. It's the sort of no harm no
8 foul question, but the answer to that is the reinsurance
9 relationship is primarily a confidential business
10 relationship. It really has nothing to do with coverage,
11 coverage in the -- of the insurance company's or the ceding
12 company's insured. It's just -- it has to with how --
13 whatever risk the insurer faces when it potentially has to
14 pay a claim from it's insured, whatever risk it faces is
15 spread. You know, I mean, that's the whole purpose of
16 insurance obviously. And these --

17 THE COURT: And read these -- this is a treaty
18 policy.

19 MR. CREAGAN: -- and there is a -- on the part of
20 reinsurers who enter into these agreements with insurance
21 companies and on the part of the insurer's themselves, there
22 is an expectation of confidentiality because, again, it is a
23 business relationship between the two of them that really
24 doesn't concern anyone else.

25 THE COURT: Also, I read that it's a treaty kind of

1 reinsurance.

2 MR. CREAGAN: It is.

3 THE COURT: It doesn't just cover one claim, it
4 covers a broad --

5 MR. CREAGAN: That is correct, it's a book of
6 business.

7 THE COURT: So why can't you just, without revealing
8 the name of the reinsurance company, just excise, or with a
9 scissor, just give them the few lines are relevant?

10 MR. CREAGAN: I'm not -- I'll be completely frank
11 with you, Your Honor. I'm not authorized by my client to
12 agree to that. Arch's position, and this is not unique to
13 Arch, but perhaps Arch is taking a tougher line on this than
14 some insurers. Arch's position is that its agreements with
15 its reinsurers are confidential and nobody's business.

16 THE COURT: The reinsurers?

17 MR. CREAGAN: With its reinsurers. Yes, I'm not --
18 obviously there are tons of communications with its insured,
19 GDI. I mentioned the multiple of reservations of rights
20 letters which discuss both the allocation issue and the
21 contract interpretation issue at much greater length than
22 this brief sentence in their reinsurance reports.

23 THE COURT: All right. So if I order it you got to
24 turn it over?

25 MR. CREAGAN: If you order we'll have to turn it

1 over but, you know again, I'll just go on the record, Arch is
2 opposed.

3 THE COURT: Is it similar to -- is it similar to
4 language in the three status reports, being very limited?

5 MR. CREAGAN: [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 THE COURT: Okay. Well, I think there's relevance
12 in the reports but I don't think there's relevance in the
13 entire report. I mean, these things are 30 pages.

14 MR. CREAGAN: No, they're much shorter than that.
15 When Mr. Buchman -- said 30 pages, he was talking about the
16 entire universe.

17 THE COURT: Okay.

18 MR. CREAGAN: So, each -- for example, the third
19 report, which I have here right in front of me is basically
20 three and a half pages.

21 THE COURT: Okay. Well, if at trial there is going
22 to be any allocation defense, it -- some of that language is
23 relevant. I would ask you -- I will order it be turned over.
24 You don't have to turn over the identity of the reinsurer,
25 you don't have to turn over the reinsurance treaty or the

1 agreements, just from the status report I would ask you, Mr.
2 Creagan to give Mr. Buchman an excise version of the
3 three --

4 MR. CREAGAN: Of each one of the three?

5 THE COURT: Each one. It just contains the -- this
6 narrow pertinent language that discusses allocation, or is
7 similar in effect to the reports you've already turned over
8 from the adjustor or whoever it is. I forget what you said.
9 But just that narrow information so that at trial the
10 plaintiff is not surprised by any claim about allocation.
11 So, again, my ruling is very narrow. I forget the term you
12 used for what you already returned over, and then you've got
13 the claim report and what --

14 MR. CREAGAN: The -- I was referring to the
15 reservation of rights letters.

16 THE COURT: The reservation of rights letters.

17 MR. CREAGAN: Right.

18 THE COURT: So whatever parallels the language in
19 the reservation of rights letter that is in the status
20 report, I think has to be turned over with respect to -- to
21 what, allocation, and was there something else, Mr. Buchman?

22 MR. BUCHMAN: No, that was it, Judge. I just want
23 to clarify though. Although each report builds on the other,
24 it's not clear in the third report when each was added.

25 THE COURT: When what?

1 MR. BUCHMAN: In the third report it's -- I'm sorry.

2 THE COURT: You can be seated. You can be -- speak
3 into the mic.

4 MR. BUCHMAN: Okay. I just wanted a clarification
5 at that we're going to get all three reports. There's
6 actually nine, it's the same three reports sent to the --

7 THE COURT: Yes, the three --

8 MR. BUCHMAN: Yes. Okay.

9 THE COURT: -- the pertinent language in the three
10 reports --

11 MR. BUCHMAN: Okay.

12 THE COURT: -- to this claim.

13 MR. BUCHMAN: Thank you, Your Honor.

14 MR. CREAGAN: Understood, Your Honor. Thank you.

15 THE COURT: Okay? So, I'll so order and I guess you
16 can order the transcript and show it to your client, okay?

17 MR. CREAGAN: Very good. Thank you, Your Honor.

18 THE COURT: All right. Now, it was with respect to
19 Federal and the drafting history?

20 MR. CREAGAN: Yes, Your Honor.

21 THE COURT: You know, I really should hear from
22 Federal because how can the files of -- is it Anthony
23 Boudain? What's his name?

24 MS. DAVIS: Galban.

25 THE COURT: Galban?

1 MS. DAVIS: Yes.

2 THE COURT: And talking about policy interpretation,
3 that being relevant here --

4 MS. DAVIS: Would you like for me to address that or
5 do you want to let Mr. Buchman go first?

6 THE COURT: Well, that's -- in effect, yes. Go
7 ahead.

8 MS. DAVIS: From here, is that okay?

9 THE COURT: Yes, that's fine. You can remain
10 seated.

11 MS. DAVIS: So, Your Honor, Mr. Galban is the
12 product line leader for Chubb for D&O policies, but Chubb
13 does not have any language at issue in this case. So, based
14 on your prior direction from our last hearing by phone, we've
15 agreed to produce all of the underwriting files, what --
16 because you told us we should so we're doing it. Obviously
17 we're going to produce all the underwriting files for all the
18 policies -- D&O policies for which Chubb was in the GDI
19 program. But Chubb does not have any policies at issue for
20 which they wrote any language, so the language which Mr.
21 Buchman continues to refer to as the bump-up exclusion, which
22 we prefer to refer to as Your Honor does, as part of the loss
23 definition -- we don't have any of our language at issue, so
24 what he's looking for now and what Mr. Galban, you know,
25 potentially has something relevant to, is the Chubb primary

1 policies that Chubb issued that contain an exclusion, which
2 I'm sure Mr. Buchman will argue is similar. We say it's
3 dissimilar to the ones that were issued to GDI, but none of
4 the language at issue in this case or even in the policies
5 which we say are not at issue in this case previously issued
6 to GDI, contains language issued by Chubb. So --

7 THE COURT: But when the policy was issued, and I
8 know the defendants have argued that the policy is clear on
9 it's face. But when the policies are issued there must have
10 been some understanding, some intent by Federal as to what
11 was covered and what wasn't covered. They didn't blindly
12 become an excess -- engage in the excess insurance business
13 without understanding the risk.

14 MS. DAVIS: Absolutely, Your Honor, and our
15 underwriting files are -- will be produced with respect to
16 the policies issued to GDI. And so anything that's in there,
17 you know --

18 THE COURT: Yes, but custom and --

19 MS. DAVIS: -- the discussion about what the risk
20 was will be revealed in --

21 THE COURT: But in --

22 MS. DAVIS: -- those underwriting files.

23 THE COURT: -- in interpreting insurance policies,
24 custom and usage is in play so that whatever's in Mr. -- his
25 name is --

1 MS. DAVIS: Anthony Galban.

2 THE COURT: -- Mr. Galban's file regarding drafting
3 history on interpretation of those clauses come into play
4 now. It's his -- when we talk about his individual file, I
5 don't think we have to make available his personnel file or
6 anything of that nature. I don't think that's what is in
7 play.

8 MS. DAVIS: But, Your Honor, let me -- if I may.
9 There -- Mr. Galban doesn't have anything about the
10 underwriting history of the policies issued to GDI. He was
11 not --

12 THE COURT: Then that ends it if your response is it
13 doesn't exist, it doesn't exist.

14 MS. DAVIS: Right, he was not the underwriter for
15 these policies. What Mr. Buchman is not looking for is what
16 Mr. Galban has about other policies issued by Chubb, not to
17 GDI, not in an excess status, but in a primary basis relating
18 to a "similar" with air quotes because I don't agree that
19 they're similar, but I'm sure Mr. Buchman will argue that
20 they are -- similar policies, policy language, but -- that
21 has -- was never issued to GDI by Chubb. So we've already
22 said we have -- you know, we are going to give the
23 underwriting files for the policies issued to GDI. If
24 there's anything in there, great, they'll have it but we
25 don't have any drafting history for the language which is not

1 our language.

2 THE COURT: All right. If there's anything in the
3 file that relates to drafting history of similar clauses,
4 even if it's in other policies and that he's talking about,
5 and not the specific policy and issue here, it's all part of
6 custom and usage it has to be turned over. So I'm going to
7 ask you to go through that file and see whether -- unless
8 you've done it already -- see whether anything exists. I
9 don't find just tenable the argument that if he's not
10 discussing this specific clause and this specific policy, it
11 doesn't have to be turned over. If he's discussing drafting
12 history of similar clauses in other policies, it has to be
13 turned over. Now, when I say similar clauses I don't mean
14 exactly paralleling to the word, the language in this
15 specific policy but any discussion that touches upon the
16 subject matter of coverage in this situation would have to be
17 turned over. That would be relevant.

18 MS. DAVIS: So, if I may, Your Honor. I don't have
19 -- you know, obviously we disagree but we respectfully will
20 do as you order, of course. But where we may get into some
21 discussion with Mr. Buchman is about what similar means I'm
22 sure that, you know, we will have that discussion.

23 THE COURT: Okay.

24 MS. DAVIS: But I understand your ruling and we'll
25 proceed.

1 THE COURT: Okay. Have I covered the two points
2 under Federal that you raised?

3 MR. BUCHMAN: I think so, Judge. Just so that the
4 record is and particularly since we have to as Ms. Davis
5 said, have continuing discussions, I just want to confirm
6 Your Honor's -- that I heard correctly that you don't want to
7 get into a debate about whether the words were sufficiently -
8 - you know, does it have to be one, you know, only one word
9 off or two words off. If it has to do -- because if Your
10 Honor may recall, Mr. Galban's statement at that conference,
11 which we quoted and that Your Honor repeated in your opinion,
12 was a generalized discussion of the industry's approach to
13 the exclusion at large, even though there are variations of
14 it.

15 THE COURT: The answer to your question is yes.

16 MR. BUCHMAN: Yes.

17 THE COURT: The answer to your question is yes.

18 MR. BUCHMAN: Okay. And the only other bucket was,
19 Judge, whether in the files of Mr. Galban or otherwise, if
20 there is -- because it was as Ms. Davis noted, the bump-up
21 exclusions, the two that they actually crafted as their own
22 primary version, the '02 form which obviously predates many
23 of the years they were operating as an excess here, and then
24 the '12 form, if -- because it's limited to those two
25 exclusions, we would like documents regarding the drafting

1 history of those two exclusions, the Chubb primary or Federal
2 primary that they crafted, even if not in the files of Mr.
3 Galban.

4 THE COURT: Okay.

5 MS. DAVIS: To the extent that it exists, yes --

6 THE COURT: Yes.

7 MS. DAVIS: -- we can do that, but I will just note,
8 again, for the record that we do not -- I mean, we
9 respectfully, you know, continue to say that the industry at
10 large in what was being done in general is not relevant to
11 the interpretation of the language in this case. And in
12 terms of what Mr. Buchman said about, you know, comparing one
13 phrase to another. If you look at the five provisions that
14 are in the five policies issued to GDI and five types of
15 policies that Mr. Buchman has agreed to narrow his original
16 search to, those are different as well. You know, so there
17 is going to be some interpretation. There's not just one --
18 what he has asked for now is not just the one phrase from the
19 one policy which relates to this case, he's asked for all the
20 ones issued to GDI over a 10 year period. So there will be
21 some give and take on that point, but again we disagree that
22 it's relevant, but we respectfully will comply with your
23 order.

24 THE COURT: Okay. Counsel are perfectly willing in
25 their right to disagree with me. You know, if we weren't

1 dealing with an insurance policy drafted by the insurance
2 company when the law is that custom and usage under certain
3 circumstances come into play, and you certainly have to hear
4 evidence at trial in regard to -- in regard to that to see,
5 you know, whether or not and how far plaintiff can go in that
6 regard, I would ordinarily agree with you. But because we're
7 only at the discovery stage and relevancy is the standard
8 now, I think you have to make it available.

9 MS. DAVIS: Thank you, Your Honor, and we'll be sure
10 to remember that later in the case.

11 THE COURT: Now, with respect to CNA and their
12 searching for their drafting history --

13 MR. BUCHMAN: I can give you a little good news on
14 that front, Judge.

15 THE COURT: Oh, I always want good news.

16 MR. BUCHMAN: So Mr. Goodstein and I had a
17 conversation out in the hallway --

18 THE COURT: Okay.

19 MR. BUCHMAN: -- while we were waiting to come into
20 court and he gave me some additional detail. Our concern
21 about the search process is because, you know, as Mr. -- CNA
22 argued in their June brief on category 1, there's at least
23 one of the bump-up exclusions that GDI had, the 5(b) reasons
24 they're called in the motion that CNA acknowledges was it's
25 own form, right? We just had that discussion about Federal.

1 And so, we were curious as to why they were not finding
2 documents about their own form. Mr. Goodstein had gave me
3 some additional detail in that regard out in the hallway. I
4 have asked him and he has conceptually agreed, as I
5 understand it to provide from someone in-house at CNA a
6 certification -- describing what they did to search for a
7 drafting history, you know, in terms of document maintenance
8 protocols and what they did to search, and both in terms of
9 what they searched for and where they searched for it,
10 systems, physical repositories, et cetera. Obviously it's
11 going to take him -- they're still not completely done with
12 the hard copy search, so he told me it might take a couple of
13 weeks to get that certification to me. With Your Honor's
14 permission, I'd like to hold the issue with CNA in abeyance,
15 because as I told Mr. Goodstein in the hallway if I get the
16 certification and after -- having a chance to study it and
17 talk with my client about it, if it makes sense in terms of
18 reconciling it with the prior representation that it was
19 their form, we may be done.

20 THE COURT: Well, tell me what order I should enter
21 on the record now, on the motion?

22 MR. BUCHMAN: Could the -- you have -- we have the
23 two rulings on the motion as to Arch and Federal. Can we
24 hold the motion in abeyance as to CNA pending receipt of the
25 certification --

1 THE COURT: Okay.

2 MR. BUCHMAN: -- and reporting back to the Court?

3 THE COURT: All right. So the motion was filed on
4 8/21?

5 MR. BUCHMAN: Correct, Your Honor.

6 THE COURT: Okay. How much time would you need to
7 resolve the matter?

8 MR. GOODSTEIN: How about -- I'm just thinking in my
9 head. I know the Jewish holidays are coming up and I'm not
10 going to be around. Is three weeks reasonable?

11 THE COURT: Okay.

12 MR. BUCHMAN: That works for us, Your Honor.

13 THE COURT: Well, when is the close of fact
14 discovery?

15 MR. BUCHMAN: December 18th, I believe.

16 THE COURT: All right. So today is the --

17 MR. BUCHMAN: September 15th.

18 THE COURT: Take until October 15th, okay? You
19 know, I'm not -- but I have to get a letter from you because
20 I don't to keep an open motion on the file.

21 MR. BUCHMAN: You need a letter from me reporting
22 back on the --

23 THE COURT: On the docket so you have to let me
24 know.

25 MR. BUCHMAN: So you want a letter from me by

1 October 15th?

2 THE COURT: Yes.

3 MR. BUCHMAN: Okay. Just want to make sure I
4 understand the deadline.

5 THE COURT: And let me know how -- the kind of order
6 I should enter on the docket --

7 MR. BUCHMAN: Okay.

8 THE COURT: -- on the motion in view of my rulings
9 and the withdrawal of certain -- you know, the agreement on
10 certain issues. These things show up on lists so we try to
11 resolve motions. All right?

12 MR. BUCHMAN: Sure. We will have a letter to you by
13 October 15th.

14 THE COURT: Okay.

15 MS. DAVIS: And Your Honor, if I may?

16 THE COURT: Yes?

17 MS. DAVIS: With respect to Federal, the subject of
18 our discussion here today is actually not part of Mr.
19 Buchman's motion to compel. This was -- it was subsequent,
20 it was not briefed in the motion to compel. We just received
21 -- you know, he and I were having discussions about this but
22 we just received the actual request. So with respect to the
23 motion to compel we had resolved everything on that. This is
24 a separate order.

25 THE COURT: Okay.

1 MS. DAVIS: So if we could just make it separate and
2 not -- we're not -- this is not a ruling against us as to a
3 motion to compel, it's --

4 THE COURT: Okay.

5 MS. DAVIS: -- your view on what we should do on the
6 current request in front of us.

7 THE COURT: Do you need a specific order from me or
8 can you order the transcript and show it to your client?

9 MR. BUCHMAN: I think like the July 5th transcript.

10 MS. DAVIS: I think we're fine with that.

11 THE COURT: Okay.

12 MR. BUCHMAN: I think your comments were
13 sufficiently clear.

14 THE COURT: All right. Has this case -- have you
15 gone to magistrate judge for mediation?

16 MR. BUCHMAN: We're actually due to see Magistrate
17 Judge Wells on January 8th?

18 MS. DAVIS: 10th, I think.

19 MR. BUCHMAN: It's Wednesday, the 10th of January.

20 THE COURT: Okay. All right. There's nothing else
21 then. Anything, anyone want to put anything else on the
22 record?

23 MR. BUCHMAN: That's it, Your Honor.

24 THE COURT: Okay. We'll stand in recess.

25 MR. BUCHMAN: Thank you, Your Honor.

1 ALL: Thank you, Your Honor.

2 (Court adjourned)

3

4

CERTIFICATION

5 I certify that the foregoing is a correct transcript from the
6 electronic sound recording of the proceedings in the above-
7 entitled matter.

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12

13

Lewis Parham

10/3/17

Signature of Transcriber

Date